No. 77-1471

In the Supreme Court of the United States

OCTOBER TERM, 1977

MICKEY EDWARDS, ET AL., PETITIONERS

v.

JIMMY CARTER, PRESIDENT OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-144a) and the district court (Pet. App. 145a-159a) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1978. The petition for a writ of certiorari was filed on April 15, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the President and Senate, acting by a self-executing treaty, may transfer to another nation property in which the United States has an interest.[1]

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[1]The case also presents a number of jurisdictional questions, which we discuss at pages 6-8 and notes 5, 11, *infra*.

CONSTITUTIONAL PROVISIONS AND TREATY INVOLVED

1. The Treaty Clause of the Constitution, Article II, Section 2, clause 2, provides that:

> [The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties * * *.

2. The Property Clause of the Constitution, Article IV, Section 3, clause 2, provides in part:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * *.

3. The Panama Canal Treaty, as signed by the President on September 7, 1977, is reprinted at Pet. App. 101a-137a. The resolution of the Senate consenting to the Treaty (124 Cong. Rec. S5796-S5797 (daily ed., April 18, 1978)) is reprinted as an Appendix, *infra*, pp. 1a-4a.

STATEMENT

1. This is one of several attempts that have been made to invoke the judicial process to halt consideration or implementation of the Panama Canal treaties. On January 16, 1978, this Court denied a motion for leave to file a complaint challenging the treaties and their consideration. *Idaho* v. *Vance*, No. 75 Original. In *Helms* v. *Vance*, D. D.C., No. 77-83, decided March 23, 1977, affirmed, C.A. D.C., No. 77-1295, decided May 3, 1977, certiorari denied, 432 U.S. 907, the district court denied injunctive relief on the grounds that the complaint was premature, that the plaintiffs (who were Members of Congress) lacked standing, and that the case presented a nonjusticiable political question. The court of appeals held that the suit was premature. In *Drummond* v. *Bunker*, D. C.Z., No. 76-0353-B, decided January 11, 1977, affirmed, 560 F. 2d 625 (C.A. 5), the district court held that service of process could not be effected by mail to procure jurisdiction in the Canal Zone.

In the present case, petitioners are 60 Members of the House of Representatives. They brought suit in the United States District Court for the District of Columbia, and they sought a declaratory judgment that the Panama Canal Treaty would deprive the United States of "property" without the consent of the House of Representatives. They argued that consent is required by the Property Clause of the Constitution, Article IV, Section 3, clause 2.

2. The district court did not reach the merits of petitioners' argument. It dismissed the suit for want of jurisdiction, holding that petitioners would not suffer any personal injury as a result of any transfer of property and that, consequently, they lack standing to sue (Pet. App. 145a-159a). The court reasoned that petitioners' only arguable injury would be the loss of a "right to vote" on the proposed transfer of property. This is not sufficient to confer standing, the court concluded, because Members of Congress do not have a general "right to vote" on issues of their choice but have only a right that the votes they actually cast be respected.

3. The court of appeals affirmed, but it did not reach the question of standing (Pet. App. 1a-144a). Because it thought that the "merits are so clearly against the parties

asserting jurisdiction" (*id.* at 5a) that the merits could be resolved more easily than the jurisdictional questions, it went directly to the substantive issues.[2]

The court of appeals concluded that the Property Clause simply establishes that legislation by Congress is a permissible—rather than the exclusive—method of transferring the property of the United States. It pointed out that the Property Clause is not phrased in a way that makes Congress the exclusive institution with authority over property, although other constitutional provisions clearly confer exclusive authority (Pet. App. 6a-9a). The court pointed out that the debates that led to the adoption of the Property Clause were concerned more with the relationship between the United States and the states than with the relationship between the United States and foreign nations (*id.* at 10a-16a). As to foreign relations, the court held, the Treaty Clause creates an alternative way of dealing with the property of the United States, and the requirement that two-thirds of the Senators agree to any treaty provides protection to the interests of the United States that is as complete, in the view of the Framers, as a

[2]This Court has done the same in some cases. See *Norton* v. *Mathews*, 427 U.S. 524. In other cases, however, the Court has indicated that jurisdictional questions should be resolved before a court reaches substantive issues. See, *e.g.*, *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274; *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 260. This practice of addressing jurisdictional questions first serves important purposes, including that of avoiding the unnecessary decision of hypothetical or abstract—but important—constitutional questions. It may be particularly important to reach jurisdictional questions first where, as here, there is a serious problem of justiciability.

requirement of legislation by simple majorities of both the House and the Senate under the Property Clause would provide (*id.* at 13a).

The court buttressed its reading of the debates with numerous examples in which property had been transferred by treaty (Pet. App. 14a-22a). The treaties with the Indian tribes often involved transfers of property, the court explained, and there are numerous examples of treaties with foreign nations in which the United States had surrendered property or territorial claims as part of border adjustments.

Judge MacKinnon dissented. He concluded that the case is justiciable (Pet. App. 25a-26a) and that petitioners have standing (*id.* at 100a-108a n. 42). On the merits, Judge MacKinnon argued that legislation by Congress under the Property Clause is the sole method of transferring property of the Uniited States.

4. After the court of appeals had rendered its decision, petitioners sought an injunction against implementation of the Treaty pending consideration of their petition for a writ of certiorari. The Chief Justice denied this request on April 11, 1978, without prejudice to such an application to the court of appeals (Pet. App. 161a).

Petitioners' request for an injunction then was denied by the court of appeals (Pet. App. 162a-163a). Judge MacKinnon again dissented.

The Chief Justice referred petitioners' renewed application for an injunction to the full Court, which denied the application on April 17, 1978 (No. A-863).

On April 18, 1978, the Senate consented to the Panama Canal Treaty (see App., *infra*, pp.).

ARGUMENT

Before we turn to the merits, we discuss a jurisdictional problem in this case. Petitioners ignore the question of jurisdiction, even though the district court dismissed the case on jurisdictional grounds. We believe that petitioners' lack of standing precludes relief, even if the Court should conclude that petitioners have a substantial argument on the merits.[3]

1. The district court held that applicants lack standing to maintain this suit. We submit that the district court is correct.

However great any person's interest may be in an issue of public policy, that person may not call on the Judicial Branch for resolution of his contentions unless he has suffered injury in fact. See, *e.g.*, *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26. Petitioners are not residents of the Canal Zone; they have no beneficial interest in the property located there; they cannot speak in the name of the United States. The only arguable "injury" that petitioners could suffer if the Panama Canal Treaty were implemented would be that they could not cast votes on the question whether certain property of the United States should be conveyed to Panama.

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[3]See also note 5, *infra* (discussing the question of jurisdiction over the President) and note 11, *infra* (discussing the political question doctrine). We believe that these are additional jurisdictional bars to the relief petitioners seek.

Our memorandum in opposition to petitioners' application for an injunction contended (pages 3-5) that the case was not ripe for judicial consideration. Now that the Senate has ratified the Treaty, however, we believe that the case is ripe. See *Pierce* v. *Society of Sisters*, 268 U.S. 510; *Buckley* v. *Valeo*, 424 U.S. 1, 113-118.

The "deprivation" of a "right to vote" in circumstances such as this is quite different from the deprivations in voting rights cases that previously have reached this Court. See, *e.g.*, *Dunn* v. *Blumstein*, 405 U.S. 330. Members of Congress have no abstract "right to vote" on subjects of their choice. Suppose that the President had not signed the Panama Canal Treaty. No Senator would be able to vote on a treaty that had not been submitted to that body, but this would not deprive him of any personal interest. Or suppose that a Committee of the House declined to report to the floor some legislation in which petitioners had an interest; they would not be able to vote on that legislation, but they would not have suffered a personal injury in fact giving them standing to sue. Similar examples could be multiplied, but they illustrate the soundness of the district court's holding that a necessary condition for "congressional standing" is action by the Executive Branch that nullifies a vote that actually had been cast. See, *e.g.*, *Kennedy* v. *Sampson*, 511 F. 2d 430 (C.A. D.C.). There is no judicially-enforceable right to be able to vote in the first place.[4]

Petitioners were free to introduce legislation and to seek to convince their colleagues that no property should be transferred to Panama without the consent of the

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[4]We do not argue that all disputes concerning the proper allocation of lawmaking powers are outside the competence of the courts. They can be resolved if a plaintiff can be found with a personal injury. Compare *Buckley* v. *Valeo*, *supra* (resolving a separation of powers argument), with *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208. It would be quite difficult for any person to establish standing to contest the transfer of property by the United States or the expenditure of money, as *Reservists Committee* illustrates. But that difficulty is not a sufficient reason to grant standing to any particular plaintiff. (Congress might, for example, authorize Members of the House to bring a *qui tam* action in circumstances such as those presented here, but it has not done so.)

House. But their arguments were unpersuasive with Congress as a body, and the Senate rejected an amendment to the Treaty that would have called for a vote by the House on any transfer of property. Amendment No. 92, 124 Cong. Rec. S4597 (daily ed., April 3, 1978) (text), 124 Cong. Rec. S4796 (daily ed., April 5, 1978) (vote). Moreover, petitioners cannot contend that the prerogatives of the House have been ignored where, as here, the House itself has not taken advantage of its own remedies (including, for example, the power of the purse). Any injury they may suffer is not the responsibility of the President (the only respondent here).[5] The injury, if any, arises because Congress as a whole does not agree with petitioners' interpretation of the powers of Congress. Petitioners' inability to persuade Congress to allow them to vote on the transfer of property does not subject them to personal injury of the sort necessary to entitle them to seek judicial relief.[6]

2. Although there is no need to consider the merits of petitioners' arguments, we submit that they have not presented a substantial issue. The court of appeals concluded that the "merits are so clearly against"

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[5]Neither the district court nor the court of appeals took note of the fact that the only defendant in this case is the President. It is established, however, that the President is immune from judicial process unless he alone has the authority to carry out any relief to which plaintiffs may be entitled. Compare *Mississippi* v. *Johnson*, 4 Wall. 475, with *National Treasury Employees Union* v. *Nixon*, 492 F. 2d 587 (C.A. D.C.). Petitioners need not have filed this suit against the President. They could have named the Secretary of State as a defendant. Their failure to do so is an independent jurisdictional bar to the maintenance of this suit.

[6]See also Note, *Congressional Access to the Federal Courts*, 90 Harv. L. Rev. 1632 (1977) (arguing that Members of Congress should not have standing to sue concerning any question unless Congress as a whole first has authorized the suit; in any other case, Members of Congress must use the political process to achieve their goals).

petitioners that it would dispose of them without considering the question of jurisdiction (Pet. App. 5a). We rely primarily on its opinion in this respect.

Article II, Section 2, clause 2 of the Constitution provides that the President shall have the power to make treaties, "by and with the Advice and Consent of the Senate * * * provided two-thirds of the Senators present concur." This Court has held that the treaty power extends to "all proper subjects of negotiation between our government and other nations." *Asakura* v. *City of Seattle*, 265 U.S. 332, 341. Petitioners assert, however, that Article IV, Section 3, clause 2 of the Constitution gives Congress *exclusive* authority over the disposition of properties of the United States. Were this argument correct, however, the power of the President and the Senate to make treaties—and with it the power effectively to conduct foreign relations—would be severely restricted. On several occasions, this Court has taken an expansive view of congressional power under the Property Clause. See, *e.g.*, *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 330-337; *Kleppe* v. *New Mexico*, 426 U.S. 529, 539-541, and cases there cited. If the congressional power to dispose of United States property, as thus broadly construed, were an exclusive power, the President would be subject to serious and undesirable limitations in the kinds of valuable consideration, if any, he would be empowered to offer in treaty negotiations.

Although Article IV, Section 3, clause 2 of the Constitution contains an affirmative grant of power to the Congress, that grant is not exclusive. Many affirmative grants of power to Congress in Article I of the Constitution bear on matters commonly subjected to the treaty power. For example, Article I, Section 8 gives Congress power to regulate foreign trade, to provide for the protection of rights in useful inventions, to make rules

governing captures on land and water, to establish a uniform rule for naturalization, and to punish offenses against the law of nations. However, "[t]he mere fact * * * that a Congressional power exists does not mean that the power is exclusive so as to preclude the making of a self-executing treaty within the area of that power." ALI, *Restatement (Second) of Foreign Relations Law of the United States* §141, p. 435 (1965). See also Story, *Commentaries on the Constitution* §1841 (1833). It is now well-established that the treaty power is concurrent with the legislative power of Congress when the subject matter is appropriate for international negotiations. See, *e.g.*, *United States* v. *Schooner Peggy*, 1 Cranch 103 (the capture of vessels); *Hijo* v. *United States*, 194 U.S. 315 (claims against the United States); *Cook* v. *United States*, 288 U.S. 102 (customs inspections); *Bacardi Corp.* v. *Domenech*, 311 U.S. 150 (trademarks). As the court of appeals explained (Pet. App. 8a), "on its face, the property clause is intended not to restrict the scope of the treaty clause, but, rather, is intended to permit Congress to accomplish through legislation what may concurrently be accomplished through other means provided in the Constitution."

Petitioners cannot argue at this late date that, as a general principle, the treaty power stops where the power of Congress begins. Instead, they seem to contend that with regard to a particular power, property disposal, the grant of authority to Congress is exclusive. This argument is refuted by the language of the Constitution, the location of the property disposal clause in the Constitution, the history of that clause and the treaty making clause, past decisions of this Court, and previous treaty practice.

First, the non-exclusionary character of the grant of power to Congress contained in Article IV, Section 3, clause 2 is apparent from the language of the Constitution. Article IV provides that Congress "shall have power" to dispose of territory or property belonging to the United States. The quoted phrase is identical to that used in Article I, Section 8, which provides that Congress "shall have power," *inter alia*, to regulate foreign commerce and to define and punish offenses against the law of nations. As we observed above, however, to the extent that the powers conferred on Congress by Article I, Section 8 concern subjects appropriate for international negotiation, those powers also may be exercised by the President and the Senate through self-executing treaties. Similarly, the power conferred on Congress in Article IV, Section 3, clause 2 is not exclusive but may be exercised by the President and the Senate pursuant to their treaty-making power. Like Article I, Section 8, Article IV contains no express statement that the power it confers—the power to dispose of territory or property—shall reside in Congress alone.[7]

Second, Article IV, Section 3, clause 2 is included in a portion of the Constitution that deals with relationships among the states and between the states and the federal government. The placement of the property disposal clause at this point in the Constitution strongly suggests

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[7]The framers of the Constitution certainly knew how to indicate an exclusive power when they so desired. For example, the wording of the appropriations and revenue clauses stands in sharp contrast to the language of other Article I clauses and the language of Article IV. Article I, Section 9, clause 7 states that "*No* Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Article I, Section 7, clause 1 states that "*All* Bills for raising Revenue shall originate in the House of Representatives." (Emphasis added.) See Pet. App. 8a-12a.

that the provision was intended to indicate the proper distribution of power between the state and federal governments, rather than among the three branches of the federal government.[8] See Pet. App. 10a-16a. It is also significant that Article IV, Section 3, clause 2 closely links "the power to dispose of" United States territory and property with "the power to make all needful rules and regulations" respecting that territory and property. Because these two aspects of congressional power stand in such a close textual relationship, their interactions with the treaty power should be similar or identical. This Court long ago determined that the treaty power can be used to make rules and regulations governing territory belonging to the United States. *Geofroy* v. *Riggs,* 133 U.S. 258; *United States* v. *Percheman,* 7 Pet. 51.

Third, the record of the proceedings during the Constitutional Convention supports the interpretation suggested by the language of the property disposal clause and its location in the Constitution. The clause was adopted during a general discussion of the role that the central government should play in connection with the

[8]Judge MacKinnon's dissenting opinion cites a line of cases in which the courts, relying on Article IV, have declared that Congress enjoys exclusive power to dispose of property in the public domain. These cases chiefly involve disputes implicating the proper distribution of power between the federal and state governments. They do not even mention the treaty power; much less do they draw any conclusions concerning the proper relationship between that power and the congressional power to dispose of United States property or territory pursuant to the Property Clause. See Pet. App. 14a-22a. For example, *Sioux Tribe of Indians* v. *United States,* 316 U.S. 317, which Judge MacKinnon cites for the proposition that Congress' Property Clause power is exclusive (Pet. App. 29a), carefully distinguished the treaty power from any power to transfer property by executive order (316 U.S. at 326 and n. 8); the Court did not intimate that property could not be transferred by treaty.

territorial claims that had been asserted by the several states with respect to the western lands. See Pet. App. 10a-14a. In the course of that discussion there was no hint whatever that the purpose or effect of the clause was to give Congress exclusive power to authorize or implement international agreements disposing of property or territory. See 2 Farrand, *The Records of the Federal Convention of 1787,* 457-459, 461-466 (rev. ed. 1937) (hereinafter cited as "Farrand").

The history of the Treaty Clause is even more conclusive. Several proposals were advanced during the course of the convention. One would have required every treaty to be approved by two-thirds of the Senate and the House of Representatives. 2 Farrand, *supra,* at 538. That proposal was rejected. Another would have required two-thirds of the Senate to concur in treaties but would have exempted peace treaties from that requirement, except for peace treaties depriving the United States of territory or territorial rights. 2 Farrand, *supra*, at 495, 532-534, 543. That proposal also was rejected. In its place, the convention adopted a proposal that required two-thirds of the Senate to concur in *all* treaties, including peace treaties involving cessions of territory. A further proposal to require the consent of the House to treaties involving any transfer of property then was not adopted. 2 Farrand, *supra,* at 548-549. Thus, the convention records demonstrate that the framers of the Constitution contemplated the transfer of United States territory and property by treaty. The significance of this history is further enhanced by the fact that the drafting of the Treaty Clause took place after the adoption of Article IV, which petitioners erroneously contend granted to Congress the exclusive power to dispose of United States territory and property.

Fourth, prior judicial decisions concerning the disposition of United States property have uniformly held that the United States can convey title by way of self-executing treaty and that no implementing legislation is necessary. For example, in *Holden* v. *Joy*, 17 Wall. 211, 247, the Court stated that the United States could, by treaty, transfer lands to the Cherokee Indians in exchange for lands held by the Cherokees. The Court considered the transfer a sale, properly made by a treaty. See also *Francis* v. *Francis*, 203 U.S. 233; *Jones* v. *Meehan*, 175 U.S. 1, 10; *United States* v. *Brooks*, 10 How. 442.[9]

Finally, past treaty practice provides many precedents supporting the authority of the President to dispose of property of the United States by treaty without statutory implementation. In addition to the Indian treaties discussed above, which were upheld by this Court on several occasions, a number of important treaties with foreign countries have ceded rights to lands claimed by the United States.[10]

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[9]These cases all involved treaties with Indian nations. Until the abolition in 1871 of the power of the Indian tribes to conclude treaties with the United States, the treaty power of the United States with respect to the Indian Tribes was co-extensive with its treaty power in dealing with foreign nations. See *United States* v. *43 Gallons of Whiskey*, 93 U.S. 188, 197. Judge MacKinnon's assertion that the Indian cases are *sui generis* and offer no support to our position (Pet. App. 86a) therefore is incorrect.

[10]For example, the Treaty between the United States and Nicaragua, 22 U.S.T. 664 (1970) (releasing property rights including leasehold of islands and proprietary rights to build a canal); the Florida Treaty with Spain in 1819, 8 Stat. 252, 256 (in which the United States agreed to "cede * * * and renounce forever, all their rights, claims, and pretensions * * *" to territories beyond the Sabine River in return for the territories of East and West Florida); the Webster-Ashburton Treaty with Great Britain of 1842, 8 Stat. 572 (where the United States ceded certain territory to Great Britain in resolution of a dispute over the location of the Northeast border); the

The foregoing principles do not mean that the United States cannot dispose of property rights by a combination of executory treaty and implementing legislation, but only that the Constitution does not require utilization of that method. In the present instance, although only the Senate has voted on the treaties in accordance with constitutional procedures, the entire Congress will certainly play a role in creating the new relationship with the Republic of Panama called for in the treaties. Substantial implementing legislation covering a wide variety of subjects is currently being prepared for submission to Congress in the near future. See Statement of Herbert J. Hansell, Legal Adviser, Department of State, to the Senate Committee of Foreign Relations concerning Panama Canal Treaties, 123 Cong. Rec. S15947 (daily ed., September 29, 1977). Petitioners will participate in this process, and the exchange of instruments of ratification of the Treaty will not become effective until the necessary implementing legislation has been passed or until March 31, 1979 (Reservation 4; App., *infra*, p. 2a).

The allocation of political authority between President and Congress, and between Senate and House, is most appropriately left to the political arena. We believe that

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Oregon Treaty with Great Britain of 1846, 9 Stat. 869 (where the United States receded from its former claim to all land south of the 54° 40' line and accepted the 49th parallel as its boundary with Great Britain). There are many other examples that need not be canvassed here. Some of the treaties are collected at Pet. App. 19a-20a and nn. 21, 22. See also Opinion of the Attorney General to the Secretary of State, dated October 11, 1977, pp. 16-17; Hearings on Panama Canal Treaty (Disposition of United States Territory) before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 95th Cong., 1st Sess., Part 2, 6-7 (1977). See generally S. Exec. Rep. No. 95-12, 95th Cong., 2d Sess. 65-69 (1978), which recommends that the Senate reject any contention that the House must concur in the disposition of property that is proposed to be made by self-executing treaty.

allocation questions are not justiciable, at least when they involve problems of foreign affairs that are peculiarly committed to the political branches of the government.[11]

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[11]Historically, determination of the method to be employed in the disposition by treaty of particular rights or claims of the United States to property or territory has been committed to the sound discretion of the Executive Branch (acting with the advice and consent of the Senate). Judicial interference in such a determination would require a court to involve itself improperly in the resolution of a nonjusticiable political question. This Court, in *Baker* v. *Carr*, 369 U.S. 186, 217, described a political question as one that cannot be resolved according to "judicially discoverable and manageable standards." Such standards are manifestly lacking with respect to the choice between a self-executing treaty and a treaty in combination with implementing legislation. That choice is a delicate one, implicating numerous factors likely to be subjects of negotiation between the United States and other nations. In many instances the negotiators would need to consider the likely consequences of postponing a treaty's operation until after the passage of implementing legislation in all participating countries. Judicial review of such matters necessarily would involve the courts in the exercise of the foreign affairs powers vested exclusively in the Executive Branch by the Constitution. Article II, Section 2, clauses 1-2; Article II, Section 3. *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304. See also *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537-542; *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 109; *United States* v. *Pink*, 315 U.S. 203, 222-223, 229-230; *United States* v. *Belmont*, 301 U.S. 324, 330. Although resolution of disputes concerning the proper allocation of power among the branches of the federal government is appropriate in some circumstances (see, *e.g.*, *Buckley* v. *Valeo*, *supra*, 424 U.S. at 123-124; *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 587-589), adjudication of the claims presented here would inevitably engage the courts in an assessment of the comparative wisdom of alternative methods of disposition by treaty of United States property or territory—precisely the sort of delicate foreign policy question whose resolution the Constitution vests in the political branches rather than the judiciary.

Whether or not we are right in this, however, the constitutional history and the problems of justiciability counsel against the position that petitioners espouse. There is, therefore, no reason for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1978.

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[12]We request that, if the Court should grant the petition, it also accelerate consideration of the case on the merits in order to hold to a minimum the period of uncertainty—and the damage that uncertainty would produce for the foreign relations of the United States—that inevitably would occur while this Court was considering the case.

DOJ-1978-04

APPENDIX

Resolved (two-third of the Senators present concurring therein), That the Senate advise and consent to the ratification of the Panama Canal Treaty, together with the Annex and Agreed Minute relating thereto, done at Washington on September 7, 1977 (Executive N, Ninety-Fifth Congress, first session), subject to the following—

(a) RESERVATIONS:

(1) Pursuant to its adherence to the principle of nonintervention, any action taken by the United States of America in the exercise of its rights to assure that the Panama Canal shall remain open, neutral, secure, and accessible, pursuant to the provisions of this Treaty and the Neutrality Treaty and the resolutions of advice and consent thereto, shall be only for the purpose of assuring that the canal shall remain open, neutral, secure, and accessible, and shall not have as its purpose or be interpreted as a right of intervention in the internal affairs of the Republic of Panama or interference with its political independence or sovereign integrity.

(2) Notwithstanding any other provisions of this Treaty, no funds may be drawn from the United States Treasury for payments under Article XIII, paragraph 4, without statutory authorization.

(3) Any accumulated unpaid balance under paragraph 4(c) of Article XIII at the termination of the Treaty shall be payable only to the extent of any operating surplus in the last year of the Treaty's duration, and that nothing in that paragraph may be construed as obligating the United States of America to pay after the date of the termination of the Treaty any such unpaid balance which shall have accrued before such date.

(4) Exchange of the instruments of ratification shall not be effective earlier than March 31, 1979, and the treaties shall not enter into force prior to October 1, 1979, unless legislation necessary to implement the provisions of the Panama Canal Treaty shall have been enacted by the Congress of the United States of America before March 31, 1979.

(5) The instruments of ratification to be exchanged by the United States and the Republic of Panama shall each include provisions whereby each Party agrees to waive its rights and release the other Party from its obligations under paragraph 2 of Article XII.

(6) After the date of entry into force of the Treaty, the Panama Canal Commission shall, unless it is otherwise provided by legislation enacted by the Congress, be obligated to reimburse the Treasury of the United States of America, as nearly as possible, for the interest cost of the funds or other assets directly invested in the Commission by the Government of the United States of America and for the interest cost of the funds or other assets directly invested in the predecessor Panama Canal Company by the Government and not reimbursed before the date of entry into force of the Treaty. Such reimbursement of such interest costs shall be made at a rate determined by the Secretary of the Treasury of the United States of America and at annual intervals to the extent earned, and if not earned shall be made from subsequent earnings. For purposes of this reservation, the phrase "funds or other assets directly invested" shall have the same meaning as the phrase "not direct investment" has under section 62 of title 2 of the Canal Zone Code.

(b) UNDERSTANDINGS:

(1) Nothing in paragraphs 3, 4, and 5 of Article IV may be construed to limit either the provisions of paragraph 1 of Article IV providing that each party shall act, in accordance with its constitutional processes, to meet danger threatening the security of the Panama Canal, or the provisions of paragraph 2 of Article IV providing that the United States of America shall have primary responsibility to protect and defend the Canal for the duration of this Treaty.

(2) Before the first date of the three-year period beginning on the date of entry into force of this Treaty and before each three-year period following thereafter, the two parties shall agree upon the specific levels and quality of services, as are referred to in Article III, paragraph 5 of the Treaty, to be provided during the following three-year period and, except for the first three-year period, on the reimbursement to be made for the costs of such services, such services to be limited to such as are essential to the effective functioning of such canal operating areas and such housing areas referred to in Article III, paragraph 5 of the Treaty. If payments made under Article III, paragraph 5 of the Treaty for the preceding three-year period, including the initial three-year period, exceed or are less than the actual costs to the Republic of Panama for supplying, during such period, the specific levels and quality of services agreed upon, then the Commission shall deduct from or add to the payment required to be made to the Republic of Panama for each of the following three years one-third of such excess or deficit, as the case may be. There shall be an independent and binding audit, conducted by an auditor mutually selected by both parties, of any costs of services disputed by the two parties pursuant to the reexamination of such costs provided for in this Understanding.

(3) Nothing in paragraph 4(c) of Article XIII shall be construed to limit the authority of the United States of America through the United States Government agency called the Panama Canal Commission to make such financial decisions and incur such expenses as are reasonable and necessary for the management, operation, and maintenance of the Panama Canal. In addition, toll rates established pursuant to paragraph 2 (d) of Article III need not be set at levels designed to produce revenues to cover the payment to Panama described in paragraph 4(c) of Article XIII.

(4) Any agreement concluded pursuant to article IX, paragraph 11 with respect to the transfer of prisoners shall be concluded in accordance with the constitutional processes of both parties.

(5) Nothing in the Treaty, in the Annex or Agreed Minute relating to the Treaty, or in any other agreement relating to the Treaty obligates the United States to provide any economic assistance, military grant assistance, security supporting assistance, foreign military sales credits, or international military education and training to the Republic of Panama.

(6) The President shall include all reservations and understandings incorporated by the Senate in this resolution of ratification in the instrument of ratification exchanged with the Government of the Republic of Panama.